

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080685
	:	TRIAL NO. B-0707191(A)
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
ROGER SMITH,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Following a jury trial, defendant-appellant Roger Smith was convicted of murder and felony murder in connection with the stabbing death of Rodney Gorley. The trial court sentenced Smith to concurrent terms of 15 years to life in prison. This appeal followed.

In his first assignment of error, Smith argues that he was prejudiced by structural error in his indictment for the offense of felony murder. The mens rea for felony murder is found in its predicate offense, which in this case was felonious assault.² Because Smith's indictment gave him adequate notice of the charge against him, his indictment for felony murder was not defective.³ We overrule the first assignment of error.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² See *State v. Nesbitt*, 1st Dist. No. C-080010, 2009-Ohio-972, ¶38.

³ See *id.* at ¶41; *State v. Salaam*, 1st Dist. Nos. C-070385 and C-070413, 2008-Ohio-4982, jurisdictional motion overruled, 121 Ohio St.3d 1409, 2009-Ohio-805, 902 N.E.2d 33.

In his second assignment of error, Smith argues that the trial court erred by failing to instruct the jury on the offenses of voluntary manslaughter and involuntary manslaughter.

The failure to instruct on involuntary manslaughter was not error. The evidence indicated that Smith and his brother had beaten Gorley about the head with a hammer and had stabbed him in the heart with a knife. No jury could have reasonably found that Smith had recklessly inflicted the injuries.⁴ Because Gorley's injuries resulted from purposeful conduct, the evidence did not reasonably support an acquittal for felony murder and a conviction for the lesser-included offense. So Smith was not entitled to an instruction on involuntary manslaughter.

And the court did not err by failing to instruct on voluntary manslaughter. The evidence presented at trial did not demonstrate that Smith had acted while under a sudden passion or fit of rage and, therefore, did not support an acquittal on the charge of felony murder and a conviction for voluntary manslaughter.⁵ Accordingly, we overrule the second assignment of error.

In his third assignment of error, Smith argues that the trial court erred "by allowing the prosecution to impeach with stale convictions." Several months before trial, the state filed a notice of its intention to use evidence of Smith's prior convictions that fell outside the ten-year time limit in Evid.R. 609(B). The proffered evidence included prior convictions for theft-related offenses, for escape, and for drug possession and trafficking.

⁴ R.C. 2903.04; *State v. Finley*, 1st Dist. No. C-061052, 2008-Ohio-4904, ¶27, jurisdictional motion overruled, 121 Ohio St.3d 1408, 2009-Ohio-805, 902 N.E.2d 33.

⁵ R.C. 2903.03; see *Nesbitt*, *supra*.

A few days before trial, the court indicated that it would be inclined to allow the state to use the evidence, determining that the probative value of the evidence likely outweighed its prejudicial effect. The court said that it had not yet reviewed each of Smith's prior convictions and that its preliminary ruling "might have to be fine-tuned" if the issue arose at trial.

After the trial had begun, the defense moved to exclude the prior-conviction evidence because it would prevent Smith from testifying. In response, the court reiterated that it would "review what records it deems appropriate to put in [evidence] at a later time."

Although the court had made an anticipatory ruling on the issue of the stale convictions, the court did not have the opportunity "to consider the admissibility of the disputed evidence in its actual context."⁶ At the close of the state's case, the defense indicated that Smith had decided not to testify. Smith did not indicate the reason for his decision, and he was not required to. His decision not to testify might have been made "simply out of fear that he w[ould] be made to look bad by clever counsel."⁷ Or he might have feared that, even without the use of the stale convictions, the jury might have been swayed by his two prior "non-stale" convictions for felonious assault with a firearm and for felony drug possession, both of which fell within Evid.R. 609(B)'s ten-year time limit.

Whatever Smith's reasons, the trial court did not have the opportunity to consider each of Smith's out-of-time convictions to determine whether, in the interests of justice, the probative value of each substantially outweighed its prejudicial effect. So

⁶ *State v. Grubb* (1986), 28 Ohio St.3d 199, 202, 503 N.E.2d 142, quoting *State v. White* (1982), 6 Ohio App.3d 1, 4, 451 N.E.2d 533.

⁷ See *Portuondo v. Agard* (2000), 529 U.S. 61, 67, 120 S.Ct. 1119.

we need not reach the question whether the trial court abused its discretion in making its preliminary ruling on the matter. We overrule the third assignment of error.

In his fourth assignment of error, Smith argues that he was prejudiced by prosecutorial misconduct in opening statements and in closing arguments. To obtain a reversal on these grounds, the defendant must demonstrate not only that the remarks were improper, but also that they deprived the defendant of a fair trial.⁸

Smith challenges several remarks, only one of which was objected to at trial. Specifically, Smith objected to the prosecutor's remark that the only evidence had been presented by the state. The court sustained the objection and instructed the jury not to consider Smith's failure to testify for any purpose.

We find no error. "[A] reference by the prosecutor in closing argument to uncontradicted evidence is not a comment on the accused's failure to testify where the comment is directed to the strength of the state's evidence and not to the silence of the accused, and the jury is instructed not to consider the accused's failure to testify for any purpose."⁹

Smith did not object to the other statements that he now challenges. Using a plain-error standard of review, we cannot say that the outcome of Smith's trial would have been different without these statements.¹⁰ Accordingly, we overrule the fourth assignment of error.

In his fifth, sixth, and seventh assignments of error, Smith challenges the weight and sufficiency of the evidence upon which his convictions were based, as well as the trial court's denial of his Crim.R. 29 motions for acquittal.

⁸ See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶140.

⁹ *State v. Ferguson* (1983), 5 Ohio St.3d 160, 163, 450 N.E.2d 265.

¹⁰ See *State v. Sanders*, 92 Ohio St.3d 245, 257, 2001-Ohio-189, 750 N.E.2d 90.

Smith was indicted for murder under R.C. 2903.02(A) and for felony murder under R.C. 2903.02(B). To find Smith guilty of murder, the jury had to find that Smith had purposely caused the death of Gorley. To find Smith guilty of felony murder, the jury had to find that Gorley's death had proximately resulted from Smith's commission or attempted commission of an offense of violence. A conviction for felony murder, with felonious assault as the underlying offense, is predicated upon evidence that the defendant had knowingly caused serious physical harm to the victim.

In this case, we hold that the evidence was such that reasonable minds could have reached different conclusions as to whether each material element of the crimes had been proved beyond a reasonable doubt.¹¹ Further, after reviewing the evidence in the light most favorable to the state, we hold that a rational trier of fact could have found that all the material elements of the crimes had been proved beyond a reasonable doubt.¹² We also determine that the trier of fact, in resolving conflicts in the evidence, did not clearly lose its way and create such a manifest miscarriage of justice that Smith's convictions must be reversed and a new trial ordered.¹³ We overrule the fifth, sixth, and seventh assignments of error.

While the issue is not raised by Smith, we find plain error in his convictions. The conviction and separate sentences on two counts of murder for a single killing violated R.C. 2941.25 and the Double Jeopardy Clauses of the Ohio and United States Constitutions.¹⁴ Therefore, we vacate only the sentences and remand the case for

¹¹ See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus.

¹² See *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

¹³ See *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

¹⁴ See *State v. Goldsmith*, 8th Dist. No. 90617, 2008-Ohio-5990, discretionary appeal allowed on other grounds, 121 Ohio St.3d 1456, 2009-Ohio-1891, 905 N.E.2d 195.

resentencing on one offense or the other. The trial court's judgment is otherwise affirmed.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HENDON, P.J., HILDEBRANDT and SUNDERMANN, JJ.

To the Clerk:

Enter upon the Journal of the Court on July 1, 2009
per order of the Court _____.
Presiding Judge